

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WINSTON KEMPER,

Petitioner,

vs.

SUPERIOR COURT OF ALAMEDA
COUNTY,

Respondent.

No. C 08-2870 JSW (PR)

**ORDER OF DISMISSAL AND
INSTRUCTIONS TO THE CLERK**

Petitioner, a prisoner of the State of California, currently incarcerated at Pleasant Valley State Prison in Coalinga, California, filed an action on the Court's habeas corpus petition form on June 9, 2008. On December 15, 2008, the Court dismissed the petition with leave to amend within thirty days because it was unclear whether Petitioner was intending to file a civil rights action, or a habeas petition, with his form petition.

The Court provided Petitioner with a copy of both of the Court's forms and advised him that he should file either an amended civil rights complaint or habeas petition within thirty days of the Court's order. However, Petitioner filed both forms with the Court. Therefore, the Court has filed the amended habeas petition on this action and directed the Clerk of Court to file the civil rights complaint as a separate action.

In the petition filed on this case, Petitioner lists a single habeas claim regarding the prosecutor's filing a false information against him which caused a conflict of interest. However, as an attachment to the petition, he specifies that this claim may already be

1 before the Court on his pending habeas petition, under Case No. C:07-4666 JSW (PR).
2 Therefore, it appears that Petitioner may be intending to amend his pending habeas action
3 with this petition, rather than to file a new action. Therefore, the Clerk shall close the
4 instant action.

5 However, Petitioner's attachment states that he did not keep a copy of what was
6 sent to the Court on the earlier matter and is unaware of whether the claim on this petition
7 has already been filed on the earlier action. While the earlier action does include a claim
8 of prosecutorial misconduct based on the knowing filing of a false information, it is up to
9 Petitioner to determine whether the claim listed here is presented in the earlier action.
10 Therefore, the Clerk of Court shall provide petitioner with a copy of the amended petition
11 currently pending before the Court on Case No. C:07-4666 JSW (PR) (docket no. 5).
12 However, Petitioner is apprised that he should keep all documents filed with the Court in
13 this case, as the Court ordinarily does not provide copies of previously filed documents,
14 although they can be obtained from the Clerk's office with the proper form and the
15 payment of a copying fee.

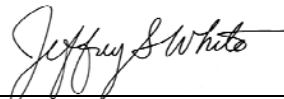
16 If Petitioner wishes to file an amended petition on Case No. C:07-4666 JSW (PR),
17 he may do so by filing an amended petition with that case number and the words
18 "amended petition" on the front page of the court's petition form within thirty days of the
19 date of this order. Petitioner need not file an amended petition if he determines that the
20 claims he wishes to pursue are already presented in the pending amended petition.

21 However, if he chooses to file an amended petition, Petitioner is reminded that an
22 amended petition filed as a matter of course or after leave of court supersedes the
23 original petition. "[A] plaintiff waives all causes of action alleged in the original
24 complaint which are not alleged in the amended complaint." *London v. Coopers &*
25 *Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981). Petitioner must include all habeas claims he
26 intends to pursue on any amended petition he files. If he wishes to amend, he must do so
27 within thirty days of the date of this order.

1 Further, Petitioner must serve a copy of any amended petition on Respondent's
2 counsel and must provide the Court with proof of service of the amended petition. The
3 Clerk of Court shall file a copy of this order in Case No. C:07-4666 JSW (PR) and serve a
4 copy on Respondent's counsel.

5 IT IS SO ORDERED.

6 DATED: January 28, 2009

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9 JEFFREY S. WHITE
10 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

WINSTON KEMPER,
Plaintiff,

Case Number: CV08-02870 JSW

CERTIFICATE OF SERVICE

v.

SUPERIOR COURT OF ALAMEDA
COUNTY et al,

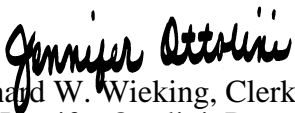
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on January 28, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Winston Kemper
Pleasant Valley State Prison
B64476
P.O. Box 8500
Coalinga, CA 93210

Dated: January 28, 2009


Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk